

**Lee Meow Lim v Lee Meow Nyin t/a
Cheong Fatt Merchant
(Nabisco Brands (M) Sdn Bhd,
Intervener)**

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R8-12-81-88
EUSOFF CHIN J
14 OCTOBER 1989

Landlord and Tenant — Tenancy, existence of — Whether written tenancy agreement and deposit required

Civil Procedure — Writ of distress — Whether claim of rental in arrears of 12 months or less is sufficient

Civil Procedure — Joinder of parties — Whether a mere commercial interest in the outcome of the action is sufficient

This is an appeal against the decision of the learned sessions court judge allowing a third party (Nabisco) to intervene and ordering the writ of distress obtained earlier to be struck out. The appellant, Lee Meow Lim, as landlord, rented out certain premises to the respondent at a monthly rental of \$4,000. The sessions court issued a writ of distress for the recovery of the arrears of rent for 12 months in 1987 amounting to \$48,000. Nabisco had earlier obtained judgment against the respondent and had initiated proceedings leading to the auction sale of the respondent's property, realizing \$30,400. Nabisco thereafter applied for orders to intervene in the proceedings to set aside the writ of distress and that no moneys be paid out to the appellant from the proceeds realized at the auction sale. Nabisco alleged that the appellant and respondent are brothers and that the living arrangements between them are not on a landlord-tenant basis as no rental has been paid. It was also alleged by Nabisco that the distress action was to prevent execution creditors from obtaining satisfaction of their judgments and to deprive Nabisco of the fruits of their litigation. Nabisco's search on the tenant showed that he is a sole proprietor of the business of Cheong Fatt Merchant. The learned sessions court judge, in his grounds of judgment, said that four questions (not raised by Nabisco) remained unexplained in the application for the writ of distress, ie the respondent did not pay rent only for 12 months, the applicant did not take any deposit, there was no written tenancy agreement, and the tenancy agreement was only an oral agreement.

Held, allowing the appellant's appeal:

(1) It is not necessary for the applicant for the writ of distress to include a claim for arrears for more than 12 months since under s 5(1) of the Distress Act 1951 he can only claim distress for 12 months' rent.

(2) It is for the respondent in an application for a writ of distress, and not a third party who is not involved in the tenancy matter, to raise the issue of the non-taking of deposit or whether the agreement was written or oral.

(3) It has never been decided by any court before that a person cannot rent out his premises to his brother, nor has it been held by any court or required by any law that a person cannot charge any rent on his premises occupied by his brother.

(4) The allegation in the affidavit of the deponent for Nabisco that the landlord and tenant were brothers and that there was no landlord-tenant relationship should have been rejected by the learned sessions court judge since the deponent

A based his allegation on purely hearsay evidence. An affidavit founded merely upon information and belief without giving the source of such information and belief, is irregular.

(5) A person had to have an interest directly related to the subject matter of an action before he was entitled to intervene in the action. A mere commercial interest in the outcome of the action, divorced from its subject matter, such as the interest of a creditor of one of the parties, was not sufficient to entitle a person to intervene.

[Editorial Note: The respondent's appeal to the Supreme Court vide Civil Appeal No 02-297-89 was heard on 18 June 1990 and the court (comprising Harun Hashim, Ajaib Singh and Jemuri Serjan SCJJ) dismissed the appeal.]

C Cases referred to

- 1 *Re J L Young Manufacturing Co Ltd* [1900] 2 Ch 753 (refd)
- 2 *Lumley v Osborne* [1901] 1 KB 532 (refd)
- 3 *Sanders Lead Co Inc v Entores Metal Brokers Ltd* [1984] 1 WLR 452 (refd)

D Legislation referred to

- Distress Act 1951 s 5(1)
Rule of the High Court 1980 O 15 r 6(2)(b)
Rules of the Subordinate Courts 1980 O 8 r 6(2), (6)

Chew Biman for the appellant.
RS Ramanathan (Miss) for the respondent.

E

Cur Adv Vult

Eusoff Chin J: The applicant Lee Meow Lim is the landlord of the whole premises known as No 278, Jalan Changkat Thambi Dollah, Off Jalan Pudu, Kuala Lumpur ('the premises'). He rented it out to Lee Meow Nyin, trading as Cheong Fatt Merchant ('the respondent'), at a monthly rental of \$4,000 per month.

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On 5 January 1988, the applicant filed an ex parte application under O 38 r 2 of the Rules of the Subordinate Courts 1980, for the issue of a writ of distress against the respondent for arrears of rent for January to December 1987.

G

On 8 January 1988, the sessions court issued a writ of distress for the recovery of the arrears of rent for the 12 months in the year 1987, amounting to \$48,000.

H Nabisco Brands (M) Sdn Bhd (hereinafter referred to as 'Nabisco') filed a notice of application (undated) supported by an affidavit of its credit controller, Lee Siew Beng, affirmed on 2 April 1988. Nabisco's application was for the following orders:

I

- (1) Leave be granted to Nabisco Brands (M) Sdn Bhd to intervene in the proceedings herein pursuant to O 8 r 6 of the Rules of the Subordinate Courts 1980;
- (2) The writ of distress abovementioned be set aside;
- (3) No moneys be paid out to the plaintiff abovenamed from proceeds realized at the auction sale carried out on 12 February 1988.

In the affidavit affirmed on 2 April 1988, Lee Siew Beng (for Nabisco) said:

- (i) that the applicant, Lee Meow Lim, was the registered owner of the premises;
- (ii) that he was informed by his business associates that the purported landlord and tenant of the premises were brothers, and that 'the living arrangement' between them are not on landlord-tenant basis as no rental has been paid; and
- (iii) that the distress action was to prevent execution creditors from obtaining satisfaction of their judgments.

In his further affidavit affirmed on 11 April 1988, Lee Siew Beng said that Nabisco had obtained judgment against the respondent (tenant) and had initiated proceedings leading to the auction sale of the respondent's property on 12 February 1988 realizing \$30,400 and that the proceeds of sale would be rateably distributed. He alleged in the affidavit that the landlord's claim for rent would have priority over other creditors. He further alleged that the landlord's distress action was to deprive Nabisco of the fruits of the litigation. In para 9 of that affidavit he alleged:

The purported landlord and tenant being brothers with the purported landlord as registered proprietor there appears to have been collusion between the landlord and tenant to deprive the company of the fruits of litigation.

Norhisham bin Abd Rahman affirmed an affidavit on 2 June 1988 in support of Nabisco's application. He said he was a clerk employed by Radhakrishnan, solicitors for Nabisco. On instruction he had conducted a search at the office of the Registrar of Business on 19 December 1987. He produced a certificate to show that the respondent, Lee Meow Nyin, was the sole proprietor of the business of Cheong Fatt Merchant having its principal place of business at the premises, and a branch No 49 Jalan Changkat Thambi Dollah, Kuala Lumpur.

The applicant, Lee Meow Lim, affirmed an affidavit on 5 May 1988 opposing Nabisco's application. In it he stated that Lee Meow Nyin, trading as Cheong Fatt Merchant, was indeed his tenant at the premises paying \$4,000 monthly rent to him and was in arrears of rent. He denied the allegation that there was no landlord and tenant relationship. He said that Nabisco's application was frivolous and vexatious as Nabisco had no interest directly related to the subject matter in the proceedings, which was for arrears of rental lawfully due to him. He also said that the affidavit of Lee Siew Beng alleging that there was no landlord-tenant relationship is purely hearsay evidence and the intended intervener's action should be struck off.

On 12 July 1988, the learned sessions court judge allowed Nabisco to intervene and ordered the writ of distress to be struck out. The applicant appealed. The learned sessions court judge in his grounds of judgment

A said that the following questions remained unexplained in the application for the writ of distress:

- (i) The respondent did not pay rent only from 1 January 1987 to 31 December 1987.
- (ii) The applicant did not take any deposit when renting out the premises.
- B (iii) There was no written tenancy agreement.
- (iv) The tenancy agreement was only an oral agreement.

These four questions were certainly not raised by Nabisco. However, as to the claim for non-payment of rent for the whole year in 1987, my view is that it is not necessary for the applicant for the writ of distress to include a claim for arrears of rent for more than 12 months since under s 5(1) of the Distress Act 1951 he can only distress for 12 months' rents. The section says:

D 5(1) A Landlord or his agent duly authorized in writing may apply ex parte to a Judge or Registrar for an order for the issue of a warrant, to be called a warrant of distress, for the recovery of rent due or payable to the landlord by a tenant of any premises for a period not exceeding twelve completed months of the tenancy immediately preceding the date of the application and the Judge or Registrar may make such order accordingly

E As regards the non-taking of any deposit for rents or whether the agreement was written or oral, it is not material to the claim for rent here, since they are issues for the respondent and not for any third party who is not involved in the tenancy matter to raise.

F It appears that the learned sessions court judge was concerned about these questions because of the allegation that the landlord and tenant are brothers. It has never been decided by any court before that a person cannot rent out his premises to his brother, nor has it been held by any court or required by any law that a person cannot charge any rent on his premises which is occupied by his brother.

G In this case, the allegation in the affidavit of Lee Siew Beng, for the intervener, that the landlord and the tenant were brothers and that there was no landlord-tenant relationship should have been rejected by the learned sessions court judge since the deponent based his allegation on purely hearsay evidence, ie he made the allegation because he was 'informed by my business associates'. Since this is a serious allegation, Lee Siew Beng, the deponent of the affidavit, should disclose who the business associates were and how the business associates had come to know that there was no landlord-tenant relationship. The English Court of Appeal has commented strongly on the irregularity of an affidavit founded merely upon information and belief, without giving the source of such information and belief (*Re J.L. Young Manufacturing Co Ltd*¹ and see *Lumley v Osborne*²). Lee Siew Beng did not even allege that the monthly rent charged on the premises was highly excessive compared with rents charged on other premises in that area.

The certificate issued by the Registrar of Business clearly shows that the tenant Lee Meow Nyin was the sole proprietor of the business Cheong Fatt Merchant. Since the landlord Lee Meow Lim was not a co-proprietor or proved to have any share in that business, I fail to see how he could be presumed to have allowed the premises to be occupied by Cheong Fatt Merchant free of charge.

Under the circumstances, I find that the writ of distress had been correctly issued, and should not have been struck off.

Nabisco's application to intervene is based on the fact that it had obtained judgment against the respondent (tenant) on 25 January 1988 and had earlier obtained and executed an order for attachment before judgment against the respondent on 8 January 1988, ie three days after the writ of distress was obtained by the applicant (landlord). The purpose of the intervening action is to get the writ of distress set aside so as to disentitle the landlord/applicant from the proceeds of the auction sale of the property of the tenant/respondent. The question is whether Nabisco should be allowed to intervene in the action for writ of distress.

The application to intervene is made under O 8 r 6(2)(b) of the Rules of the Subordinate Courts 1980, which is similar to O 15 r 6(2)(b) of the Rules of the High Court 1980.

Order 8 r 6(2)(b) of the Rules of the Subordinate Courts 1980 states:

At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application

- (b) order any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon be added as a party.

In *Sanders Lead Co Inc v Entores Metal Brokers Ltd*,³ the Court of Appeal held that a person had to have an interest directly related to the subject matter of an action before he was entitled to intervene in the action under RSC O 15 r 6(2)(b)(ii). A mere commercial interest in the outcome of the action, divorced from its subject matter, such as interest of a creditor of one of the parties, was not sufficient to entitle a person to intervene.

Nabisco is clearly a creditor of 'one of the parties', ie the respondent in the distress action. He should not have been allowed to intervene in this action.

I therefore allowed the appeal with costs.

Appeal allowed.

Solicitors: *Chew Biman & Co; Syarikat Radhakrishnan.*

Reported by *Wong Kim Fatt*

A Zublin Muhibbah Joint Venture v Government of Malaysia

HIGH COURT (KUALA LUMPUR) — ORIGINATING
SUMMONS NO R8-24-41-89
EUSOFF CHIN J
19 JUNE 1989

B *Arbitration — Foreign attorney — Whether an American attorney can assist in the arbitration proceedings if he is not an advocate and solicitor — Functions exercised by American attorney normally done by an advocate and solicitor — Functions performed in arbitral forum and not courts of justice — Legal Profession Act 1976, ss 36 & 37(1)*

C *Legal Profession — Foreign attorney — Whether an American attorney can assist in arbitration proceedings if he is not an advocate and solicitor — Functions exercised by American attorney normally done by an advocate and solicitor — Functions performed in arbitral forum and not courts of justice — Legal Profession Act 1976, ss 36 & 37(1)*

D The plaintiff had entered into a contract with the defendant to construct for the defendant three berths at the Johore Port. Claims were made by the plaintiff and counterclaims by the defendant under the contract which went to arbitration. In the arbitration proceedings the plaintiff retained a firm of solicitors to represent them and an American attorney was required by the solicitors to assist in the cross-examination of the witnesses because of his wide experience involving the particular type of contract. Counsel for the defendant objected to the presence of the American attorney at the arbitration on the ground that he was not an advocate and solicitor under the Legal Profession Act 1976 and the arbitrator asked the parties to make an application to sort out the objection.

F **Held**, granting the declarations sought by the plaintiff:

(1) An advocate and solicitor who is a qualified person under s 36(1) of the Legal Profession Act 1976 is given exclusive right by the law to appear and plead in all courts of justice in Malaysia. However, that section does not give exclusive right to him nor prohibit him from appearing in other tribunals which are not courts of justice in this country. An unauthorized person is prohibited under pain of penalty from performing any of the acts mentioned in s 37 of the Act. However, s 37 of the Act is specific in the sense that those acts to be performed must be done in the courts in Malaysia, or relating to any proceedings in any court in Malaysia.

H (2) An arbitral forum is not a court of justice in Malaysia as envisaged by the Legal Profession Act 1976. It is a private tribunal. Any person who assists a party in presenting his case may also attend for the arbitrator which is either provided for by the arbitration agreement or under s 13 of the Arbitration Act 1952.

I (3) Even if the American attorney might have taken actions or performed the duties which normally are done by an advocate and solicitor in this country, he had done so not in or relating to a court in Malaysia, but only in or relating to an arbitration proceeding. His actions therefore did not offend s 37 of the Legal Profession Act 1976.

(4) The law governing arbitration proceedings in Malaysia is the Arbitration Act 1952 and the Legal Profession Act 1976 has no application to arbitration proceedings in West Malaysia.